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In the Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners

v.

WILLIAM CONWAY, COMMISSIONER OF MOTOR VEHICLES, STATE OF VERMONT, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THIS COURT HAS JURISDICTION TO DECIDE THE QUESTION PRESENTED IN THE PETITION.

Respondents argue (Br. in Opp. 2-17) that this Court lacks jurisdiction to review the federal question presented in the petition because petitioners failed to preserve it. In fact, however, petitioners expressly raised the question in the courts below and the Supreme Court of Vermont expressly decided it. At all stages in the state court litigation, petitioners asserted their claim for a refund as an integral part of their claim for relief under the federal Constitution. No opinion of this Court has ever suggested that the Court lacks jurisdiction to consider the appropriate remedy for a federal constitutional violation where, as here, the complaining party has both alleged a federal constitutional violation and demanded a specific type of relief as a consequence of that violation at all stages in the lower courts.

A. Petitioners Properly Raised The Federal Question At Trial And In The Vermont Supreme Court.

1. As the Supreme Court of Vermont stated (Pet. App. 4a), petitioners' original complaints in the Vermont Superior Court "sought declaratory and injunctive relief, contending that the fees imposed [by the Vermont statutes] violated their rights under the Commerce Clause of the United States Constitution [and] . . . the Fourteenth and Fifth Amendments." See also *id.* at 17a, 26a. As the Supreme Court of Vermont also stated, petitioners demanded a refund of taxes collected pursuant to the unconstitutional statutes as an integral part of their federal constitutional claim: "In addition to the request for injunctive and declaratory relief, plaintiffs sought repayment by the State of any fees collected pursuant to the challenged statutes" (*id.* at 4a). At no time did petitioners ever separate their claims for declaratory, injunctive, and monetary relief; each claim was part and parcel of a demand for full relief to redress violations of the United States Constitution. After prevailing on the

merits, petitioners argued before the trial court that their right to monetary relief followed as a necessary consequence of the finding of unconstitutionality. Thus, petitioners reiterated their demand for "[a]n order directing defendants to repay to plaintiffs . . . any fees or penalties wrongfully, illegally or unconstitutionally collected." Br. in Opp. App. 31a.

When the Vermont Superior Court granted injunctive and declaratory relief but declined to order a refund, petitioners contended in the Supreme Court of Vermont that the favorable ruling on the merits necessarily entitled them to monetary relief as well. Petitioners noted that courts order "refunds of highway use fees" as a matter of course "after determining that the statute authorizing the fee was unconstitutional." Br. in Opp. App. 12a. Petitioners made clear that they "explicitly dispute[d]" that the "doctrine of sovereign immunity" could be applied to preclude a refund in a constitutional case such as this one. *Id.* at 14a. In particular, petitioners cited (*id.* at 15a) a decision of this Court, *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 690-691 (1949), that restricted the ability of government officials to plead sovereign immunity to foreclose federal constitutional claims.

In short, petitioners made clear in the state court litigation that their right to declaratory, injunctive, and monetary relief stemmed from the Commerce Clause and the Fourteenth Amendment. Petitioners demanded each of these remedies as an inseparable part of their claim for full relief under the Constitution. In these circumstances, respondents have no basis for opposing jurisdiction.

2. A review of this Court's decisions confirms the fallacy in respondents' jurisdictional objections. As the Court has pointed out, "[o]ur jurisdiction does not depend on citation to book and verse" (*Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982)) and "no particular form of words or phrases is essential." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 85 n.9 (1980). The Court

has jurisdiction to review even "inexplicit" constitutional claims asserted in the lower courts. *Braniff Airways* v. *Nebraska Board*, 347 U.S. 590, 598-599 (1954).[1] Thus, the Court's decisions amply demonstrate that "[s]ubstantial generosity is shown in accepting significant changes in the focus of an argument once the threshold of presentation to the state courts is crossed." 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice & Procedure* § 4022 at 704 (1977).

Respondents' contrary assertion rests on the artificial theory that petitioners had a duty to separately label and analyze the constitutional arguments supporting their claims for declaratory, injunctive, and monetary relief. See Br. in Opp. 17 n.6. But "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Illinois* v. *Gates*, 462 U.S. 213, 220 (1983). All that is required is "that the alleged right of a federal character must in some way be drawn to the attention of the state court so that it may know, or from the nature of the pleadings be held to have known, that a federal right was before it for adjudication." *St. Louis Railway Co.* v. *Starbird*, 243 U.S. 592, 597 (1917). "The federal right is not required to be pleaded in any special or particular form." *Id.* at 598. Indeed, this Court's recent decisions have reviewed constitutional claims when the parties presented the substance of those claims in the courts below even though no explicit mention of the federal Constitu-

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[1] In *Braniff*, the Court decided a Fourteenth Amendment issue even though the appellant had not presented that issue in state court. The Court found it sufficient that the appellant had "timely raised and preserved its contention that its property was not taxable." See also *Lear, Inc.* v. *Adkins*, 395 U.S. 653, 662 n.10, 678-680 (1969), addressing the constitutional question whether federal law "preempts" the doctrine of estoppel in patent litigation, even though the appellant had advocated only an "exception" to the estoppel doctrine in state court. The Court pointed out in *Lear* that "we have the duty to consider the broader implications of Lear's contention, and vindicate, if appropriate, its claim to relief on somewhat different grounds than it chose to advance below."

tion appeared in the record. See, *e.g.*, *Wood* v. *Georgia*, 450 U.S. 261, 265 n.5, 275-277 (1981); *Vachon* v. *New Hampshire*, 414 U.S. 478, 479 n.3, 481-482 (1974).

The authorities cited by respondents serve only to confirm the defects in their jurisdictional objections. In *Webb* v. *Webb*, 451 U.S. 493, 495-501 (1981), this Court declined to assume jurisdiction when it appeared "that nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon." In addition, "nowhere did [the petitioner] cite to the Federal Constitution or to any cases relying on the . . . Federal Constitution." Likewise, in *Illinois* v. *Gates*, 462 U.S. at 220, the parties "never . . . raised or addressed the question whether the federal exclusionary rule should be modified in any respect," even in the petition for certiorari. In this case, by contrast, the claims for relief asserted by petitioners rested on the Commerce Clause and the Fourteenth Amendment at every stage of the litigation; the briefs submitted in the Vermont Supreme Court addressed the relationship between the federal Constitution and the asserted right of refund; and in those briefs the parties cited federal constitutional decisions analyzing the limits of the doctrine of sovereign immunity. This suffices to support jurisdiction.

B. The Vermont Supreme Court Expressly Decided The Federal Question.

This Court has jurisdiction to review the question presented in the petition for an independent reason: the Supreme Court of Vermont considered and decided it. In its opinion, the Supreme Court of Vermont acknowledged that petitioners' claims for relief rested on the federal Constitution. Pet. App. 4a, 9a. And the court analyzed the relationship between petitioners' constitutional claim for monetary relief and the doctrine of sovereign immunity (*id.* at 10a-11a):

> We base our decision on sovereign immunity. . . . [S]uits challenging the constitutionality of a state statute or its enforcement are not considered suits

> against the State for purposes of sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949); . . . But an action to recover money which would be payable from state funds may be barred as a suit against the State. *Larson, supra*, 337 U.S. at 691 n. 11; . . . This distinction is grounded in the principle of sovereign immunity that the state legislature should determine the State's liability for money judgments.

The Vermont Supreme Court also stated its belief that this Court's past decisions establish that a "suit for a refund of taxes allegedly collected in violation of the Commerce Clause is a suit against the state," which may be "barred by sovereign immunity." Pet. App. 11a. Its opinion, which relies on several decisions of this Court (*id.* at 10a-11a), including *Larson*, therefore demonstrates that the court actually decided petitioners' claim that the federal Constitution forecloses the defense of sovereign immunity in cases of this kind. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 159 n.5 (1980) (holding that a state supreme court opinion sufficiently addressed a federal constitutional issue even though there "is no specific reference to the Federal Constitution in the court's *per curiam* opinion," because the opinion discussed general principles of federal constitutional law); *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980).

C. Acceptance Of Respondents' Jurisdictional Arguments Would Convert 28 U.S.C. § 1257 Into A Trap For Litigants.

Respondents' artificial pleading arguments, which have more basis in *Chitty on Pleading* than in prior decisions of this Court, would turn 28 U.S.C. § 1257 into a trap for litigants and would seriously erode this Court's ability to protect federal constitutional rights. In the present case, it would be particularly unjust to accept respondents' contrived objections to this Court's jurisdiction over the refund issue when, at all stages in this litigation, all parties understood that petitioners sought a tax refund as an integral part of their federal constitutional claim,

and petitioners received express assurances that the Vermont courts would grant a refund if petitioners prevailed on the merits.

When petitioners originally filed suit in federal court seeking to enjoin collection of the unconstitutional state taxes, the federal court relegated them to state court on the ground that they had an "adequate remedy" in state court, including an "award of monetary relief." Pet. App. 86a. That ruling rested on an affidavit from the State of Vermont that described available refund remedies. *Id.* at 86a n.1. When petitioners then turned to the Vermont Superior Court, it too denied preliminary injunctive relief against collection of the unconstitutional taxes, again assuring petitioners of the availability of a refund should they prevail on their constitutional claims (*id.* at 80a-81a):

> [T]he Court finds that no irreparable injury will occur to Plaintiffs should the new fee system be permitted to go into effect. Defendants' records will permit any excess fees wrongfully collected to be exactly determined and speedily refunded to specific Plaintiffs should they prevail on the merits.

When the Vermont Superior Court later invoked the doctrine of "sovereign immunity," it nonetheless referred to the availability of monetary relief following administrative proceedings, citing a statutory right of "refund" to recover a tax "which 'has been illegally . . . collected.'" Pet. App. 32a & n.2. The Supreme Court of Vermont was the first court to state that *no* right of refund was available by virtue of the doctrine of sovereign immunity (*id.* at 10a-12a)—and even that court had previously remanded the case on the express assumption that petitioners would be "entitled to refunds for taxes collected . . . on the ground that the taxes were unconstitutionally exacted" (*id.* at 27a).

Respondents now scold petitioners for failing to petition the state supreme court for rehearing to further litigate their right to a refund. Br. in Opp. 13-16. In fact, however, petitioners would have risked additional

infringement of their constitutional rights if they had sought rehearing and delayed issuance of the mandate. As petitioners explained to the Vermont Supreme Court in their Motion for Shortening of Period for Issuance of Mandate, pp. 3-4 (filed Feb. 28, 1986):

> Plaintiff-Appellees' remedy in this matter has been limited to prospective relief. . . . The inequitable result is that, because the statutes are still technically in effect, members of the Plaintiff-Appellees class are still being compelled to make payments under an unconstitutional law without hope of a refund.
>
> The State is taking full advantage of this technicality. Secretary of the Agency of Transportation, Susan C. Crampton, has issued a statement . . . declaring the State's intent to enforce the unconstitutional laws until . . . the day before the mandate is issued.

In these circumstances, respondents can hardly fault petitioners for turning promptly to this Court for protection of their federal constitutional rights. See *PruneYard Shopping Center* v. *Robins*, 447 U.S. at 86 n.9.

II. THE DECISION BELOW IMPAIRS PETITIONERS' RIGHTS UNDER THE COMMERCE AND DUE PROCESS CLAUSES.

Little need be added on the merits of the case, since respondents have said almost nothing in defense of the result below and have not denied its practical importance. In particular, respondents have not disputed our showing that a refund of taxes exacted in violation of the Commerce Clause is necessary to effectuate the prohibition of discrimination against interstate commerce, that the tax payments made by petitioners were involuntary, and that the decision below conflicts with a recent decision of the Supreme Court of New Hampshire.

Respondents nonetheless take the position that a state may impose a tax on interstate motor carriers in blatant violation of the Commerce Clause, coerce the carriers to pay the tax (even while litigating its constitutionality) by preventing them from engaging in commerce in the state, and then refuse to refund the tax after it has been

declared unconstitutional. Not surprisingly, that is not the law. This Court's decisions establish that "denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States is itself a contravention of the Fourteenth Amendment." *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930).

Respondents attempt to avoid this principle by relying on the Eleventh Amendment. But the Eleventh Amendment merely "bars suits against the States in *federal* court" (*Atascadero State Hospital* v. *Scanlon*, 105 S. Ct. 3142, 3147 (1985) (emphasis added)) and thus has nothing to do with this case. See *Nevada* v. *Hall*, 440 U.S. 410, 420 (1979). It is true, of course, that the Eleventh Amendment is an affirmation that the states possess a common law sovereign immunity in their own courts. See *Atascadero*, 105 S. Ct. at 3145. That common law immunity, however, may not be used to bar a suit for the refund of taxes involuntarily assessed in violation of the federal Constitution.

First, as explained in the petition (at 21), it has never been thought that the Constitution permits sovereign immunity to be invoked to bar suits for *restitution of specific property* wrongfully withheld, as opposed to damages. See, *e.g.*, *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 685-686 (1982); *Tindal* v. *Wesley*, 167 U.S. 204 (1897). That is the precise situation here: as cases such as *Carpenter* and *Ward* v. *Love County*, 253 U.S. 17, 24 (1920), recognize, a party who protests the payment of unconstitutional taxes, through the filing of a lawsuit or otherwise, puts the state on notice that the challenged taxes constitute specific property subject to restitution and should be segregated from funds in the general treasury. The brief in opposition, which does not dispute that petitioners satisfied this notice requirement by filing suit *before* the taxes went into effect, offers no answer to this argument.[2]

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[2] The Vermont Supreme Court rejected the restitution argument in reliance on *Larson* v. *Domestic and Foreign Commerce Corp.*,

Second, and more important, this Court has already held that sovereign immunity is no defense to a suit, in *state* court, to recover taxes assessed in violation of the Constitution. See Pet. 17-22. Respondents' efforts to distinguish those precedents merely reflect their confusion between Eleventh Amendment and sovereign immunity principles.

To begin with, the fact that *Ward* and *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U.S. 239 (1931), involved suits against counties rather than states was entirely irrelevant to this Court's analysis. The Court's decisions simply enforced the guarantees of the Fourteenth Amendment that property not be taken "arbitrarily and without due process of law" (*Ward*, 253 U.S. at 24) —a guarantee that applies with full force to the states. To be sure, there is a distinction between states and counties for Eleventh Amendment purposes, because the Eleventh Amendment confers immunity from suit in *federal* court only on the states. But *Ward* and *Iowa-Des Moines*—like this case—were suits brought in *state* court, and therefore in no way turned on the defendant's status as a county.[8]

Moreover, respondents are simply wrong in suggesting that the Court in *Carpenter* ordered a refund of the unconstitutionally assessed taxes pursuant to state statute. Although the taxpayers had brought suit in reliance on a state refund statute, the Supreme Court of Oklahoma

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supra, which stated that sovereign immunity applies in constitutional cases if the plaintiff seeks "the disposition of unquestionably sovereign property." 337 U.S. at 691 n.11. In the present case, however, the property at issue is *private* property, seized by the State under compulsion and subject to advance protest. It is the antithesis of "unquestionably sovereign property."

[8] By contrast, *Lincoln County* v. *Luning*, 133 U.S. 529 (1890), and *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), the two cases cited by respondents to support their state-county distinction (Br. in Opp. 23 n.12), were suits brought in *federal* court and thus raised questions of Eleventh Amendment immunity.

held that the statute was inapplicable. See *Carpenter* v. *Shaw*, 272 P. 393, 395 (1928). This Court reversed, explicitly relying on its holding in *Ward*, 253 U.S. at 24, that "*no statutory authority was essential* to enable or require" the refund of money collected in violation of the Constitution. *Carpenter*, 280 U.S. at 369 (emphasis added).

Congress could have allowed suits such as this to be brought in federal court. See, *e.g.*, *Atascadero*, 105 S. Ct. at 3145; *Parden* v. *Terminal Ry.*, 377 U.S. 184, 192 (1964). Instead, Congress took the opposite approach—it insisted, by passing the Tax Injunction Act, that state tax litigation be centralized in state courts. Congress did so on the express assumption, rooted in the Supremacy Clause, that the doors of the state courts would be open for the vindication of federal claims and that taxes exacted in violation of the federal Constitution would be refunded. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 412 & n.28, 413-414 (1982). Yet the upshot of respondents' argument is that states may seize money or property through coercive and unconstitutional taxes, and no court anywhere may order restitution. That startling argument, accepted by the Vermont Supreme Court but rejected by this Court, plainly warrants review.[4]

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[4] Respondents have filed a conditional cross-petition (No. 86-276) challenging the Vermont Supreme Court's decision striking down the state tax under the Commerce Clause. As respondents acknowledge (86-276 Pet. 7-8), the Vermont Supreme Court's decision on the merits directly conflicts with the decision of the Supreme Court of Pennsylvania in *American Trucking Associations, Inc.* v. *Scheiner*, appeal docketed, No. 86-357 (U.S. Sept. 3, 1986). The instant case, which raises important remedial issues, thus presents an excellent complement to the substantive question presented in *Scheiner* and should be considered in tandem with that case. In the alternative, the Court may wish to hold this petition and the conditional cross-petition pending disposition of the appeal in *Scheiner*.

Respectfully submitted.

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